UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMES RAY, Plaintiff, - against - DONALD WATNICK, JULIE STARK and JOHN DOES 1-5, Defendants.	**Case No. 1:15-cv-10176-JSR**

DEFENDANTS, DONALD WATNICK AND JULIE STARK'S, MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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PRELIMINARY STATEMENT

Defendants Donald Watnick, Esq. ("Watnick") and Julie Stark, Esq. ("Stark")(collectively, "Defendants"), submit this memorandum in support of their motion to dismiss the Complaint in its entirety, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6). The Complaint asserts a single cause of action pursuant to New York Judiciary Law §487 ("§487"), which provides for a private cause of action against lawyers who intentionally deceive a court or a party in the course of judicial proceedings.

This action can only be viewed as retaliation by Plaintiff Ames Ray ("Plaintiff") for Defendants' entirely appropriate advocacy on behalf of Plaintiff's former wife Christina Ray ("Christina") in the defense of breach of contract litigation presently pending in New York State Supreme Court. That action, entitled *Ames Ray v. Christina Ray*, Index No. 604381/1998 (the "Underlying Action") has been pending since 1998 before the Hon. Charles E. Ramos. Watnick was retained by Christina in 2012, after fourteen years of litigation.

The Complaint focuses on statements made in legal briefs submitted relative to two pre-trial motions *in limine*, including Christina's motion for spoliation of evidence against Plaintiff and Plaintiff's motion to preclude admission of Christina's expert report at trial. Years after those motions were litigated, when the Underlying Action is finally in a trial-ready posture, and after Judge Ramos sanctioned Plaintiff and/or his counsel for commencement of frivolous collateral litigation against Christina, Plaintiff filed this action against Christina's counsel. Plaintiff alleges that certain statements contained within those pre-trial motions constituted a deceit upon the Court. In bringing the Complaint, Plaintiff scoured the voluminous records of a multitude of court proceedings, motions and appeals in the Underlying Action and identified eight purportedly deceitful statements allegedly made by Defendants, plucked out of context from legal briefs without record citation. None of these statements support a plausible §487 claim against Defendants.

Rather, the Complaint should be dismissed as a matter of law because it fails to contain facts plausibly establishing the elements of such a claim insofar as it improperly seeks to label appropriate advocacy as deceit; incredibly labels as deceit statements contained in, and based on, Judge Ramos' underlying state court decision; and is devoid of any factual allegations establishing the requisite intent to deceive or proximately caused damages.

In fact, all of the statements in the Complaint are, at most, controverted assertions about the nature of the evidence and sufficiency of discovery in the action. Defendants' conduct in making arguments from disclosed facts, involving a plausible reading of documents relative to controverted issues, is garden variety advocacy falling well within the bounds of the adversarial process, not intentional deceit actionable under §487. Such advocacy is not the extreme, egregious misconduct required to satisfy the strict standard necessary to sustain a treble damage action under the statute. Even, assuming *arguendo* Defendants' factual or legal arguments were "unfounded" or "meritless," such advocacy does not give rise to a §487 claim. There is simply no plausible basis to conclude from the facts alleged in the Complaint that Defendants made any knowingly false statement or did so with the requisite intent to deceive. These failures are fatal to the claim.

The Complaint is further defective under Fed. R. Civ. P. 8 as to both Defendants, but particularly as to Stark as: she was not an employee, partner or associate of Watnick; she was not attorney of record; she did not sign a single brief in the underlying action; and she only appeared in the argument of a single motion in the Underlying Action. Nevertheless, the Complaint lumps her together with Watnick without any plausible factual basis distinguishing her conduct from his. The failure to isolate key allegations against her in and of itself warrants dismissal under *Twombly* and *Iqbal*.

Finally, where, as here, the alleged deceit was known and controverted in the underlying proceeding in which it allegedly occurred, such a claim should have been raised in that proceeding. This is particularly so because the Underlying Action is still pending before the same Judge, one of the orders which resulted from the subject motions is still law of the case below, and the pursuit of shadow litigation by Plaintiff against his former wife's attorney can have a chilling effect upon Watnick's zealous advocacy in the upcoming trial of that action. For all these reasons, Defendants' motion to dismiss should be granted.

STATEMENT OF FACTS [1]

The Parties

Plaintiff is a litigant in the Underlying Action, which he commenced in 1998 against his former wife, Christina. Exh. "A", ¶¶11-12.[2] Watnick is an attorney who began representing Christina in 2012 and is attorney of record in the Underlying Action. *See* Exh. "A", ¶15; *see also* Unified Court System Case Detail annexed as Exh. "B". He submitted the briefs at issue in this action. *See* Exh. "A", ¶¶18, 21, 22. Stark is also an attorney who is in private practice. Her publicly filed Office of Court Administration registration records reflect she is not and was not an associate or partner of Watnick despite the contrary claims in the Complaint. *See* O.C.A. Registration forms for Julie Stark annexed as Exh. "C". *See also* Exh. "A", ¶9. Stark is not listed as an attorney of record in the Underlying Action. *See* Exh. "B".

Summary of the Underlying Action

The Underlying Action involves a series of purported agreements allegedly entered by Christina to memorialize her alleged financial obligations to her former husband. *See* Summary Judgment Decision dated January 11, 2008 annexed as Exh. "D". Two of those alleged agreements have been referred to in the Complaint and in the Underlying Action as the "Confession of Judgment" and the "Penalty Document." *See* Exh. "A", ¶35.[3]

One of the issues also in dispute in the Underlying Action is whether Christina had sold, and was required to compensate Plaintiff for, his interest in a property jointly owned by Plaintiff and Christina in Sagaponack, New York (the "Sagaponack Property"). Exh. "D", pp. 4-5. The parties also dispute whether

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[1] The facts stated herein are based upon the Complaint, the briefs incorporated by reference, other state court filings in the Underlying Action, orders and public records, which this Court can properly consider on this motion. *See* Point I, *infra*.

[2] A copy of the Complaint is annexed as Exh. "A" to the accompanying Declaration of Janice J. DiGennaro dated February 25, 2016 (the "DiGennaro Dec."). All references to "Exh." herein shall refer to corresponding exhibits annexed thereto.

[3] Plaintiff alleges that the Penalty Document required Christina to supply Plaintiff with detailed financial information on a designated schedule and that if she failed to do so, she accrued a $50 per day penalty. *See* Exh. "D", pp. 3-4.

Plaintiff paid off certain of Christina's credit card debts, which sum is referred to in the Confession of Judgment. *See* Exh. "A", ¶46.

Plaintiff claims that these documents are enforceable obligations of Christina, as she signed them or affixed her fingerprints to them at his request. *See* Exh. "D", p. 2. However, Christina claims the alleged agreements are not enforceable, including because "they [were] devoid of performance and consideration, intertwined in the relationship between the parties, reflect phantom transactions and were entered under duress." *See* Exh. "D" at p. 2. Christina alleged that Plaintiff engaged in oppressive behavior, which she contends forced her to sign the documents and agreements at issue. *Id.*, p. 3.

Long before Watnick was retained, both parties made motions for summary judgment in the Underlying Action. *See* Exh. "D". Judge Ramos granted Christina's motion and denied Plaintiff's motion and expressly addressed certain of the statements Plaintiff now claims were deceitful in his decision. Specifically, Judge Ramos found that Christina's "disturbing allegations of the Plaintiff's oppressive behavior, which [Christina] contends forced her to sign the documents and agreements" (*id.*, p.3) were "credible" (*id*). He reached this conclusion, in part, based on what the court characterized as Plaintiff's "admission" at his deposition that he "physically abused" Christina "maybe to alleviate some fear she had about what [Plaintiff] might do." Exh. "D", p. 3.[4]

Watnick was retained in 2012. *See* Exh. "A", ¶15. Thereafter, he took the deposition of Plaintiff's attorney in the Underlying Action, Peter C. Alkalay ("Alkalay"), who had at various times represented both Christina and Plaintiff. *See* Watnick Memorandum of Law in Support of Motion *In Limine* to Exclude Evidence annexed as Exh. "F", pp. 4-6.

Alkalay's testimony confirmed his role in drafting the Confession of Judgment and Penalty Document

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[4] In 2009, the Appellate Division reversed the grant of summary judgment to Christina, finding there were issues of fact. The Appellate Division did not address Judge Ramos' denial of Plaintiff's motion for summary judgment or Judge Ramos' finding that the claim of oppressive circumstances was "credible," as neither issue was before it. *See* Appellate Division decision dated April 7, 2009 annexed as Exh. "E".

(referred to by Plaintiff as the "Financials Agreement"). *See id.* Alkalay was also counsel of record for Plaintiff and Christina in a lawsuit against a contractor named Salomon who performed work on the Sagaponack Property (referred to as the "Salomon Litigation" in the Complaint, at ¶38, fn. 1; *see also* Exh. "F", pp. 6-7). Alkalay conceded that he never placed a litigation hold on his files for the Salomon Litigation Files. *See* So-Ordered Transcript of Proceeding on April 30, 2013 errata sheet annexed as Exh. "G", pp. 10, 11, 13, 15.

On December 5, 2012, as a result of the Alkalay testimony, Watnick filed a motion *in limine* on Christina's behalf seeking sanctions and adverse inferences against Plaintiff for Plaintiff's or his counsel's spoliation of evidence (the "Spoliation Motion"). *See* Exh. "A", ¶35. The motion was fully briefed by the parties.[5]

Plaintiff also made a motion *in limine* to preclude Christina's psychiatric expert report (the "Preclusion Motion"). *See* Exh. "A", ¶¶19-21. This motion was fully briefed as well.[6] Both motions were argued before Judge Ramos on April 30, 2013. *See* Exh. "G".[7]

The court granted Christina's Spoliation Motion (*see* Exh. "A", ¶40; and Orders of Judge Ramos filed July 22, 2013 and July 18, 2013 and decision annexed collectively as Exh. "Q") and denied Plaintiff's Preclusion Motion. *See* Exh. "R". Judge Ramos expressly found that files/documents relative to the Salomon Litigation, Confession of Judgment and Penalty Letter were not preserved and no litigation hold was placed on the files. Exh. "Q", p. 4; *see also* Exh. "G", pp. 10,11, 13. He also found that while the Penalty Letter and Confession of Judgment were part of the record, "the files containing correspondence between the parties and Alkalay during their creation or the drafts of the documents have not been produced…." Exh. "Q", p. 2. Plaintiff appealed.[8] *See* Exh. "A".

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[5] *See* Defendants' Brief, Watnick Affirmation and Excerpts of Exhibits in support of the Motion annexed as Exhs. "F" and "H" to DiGennaro Dec. and Plaintiff's Opposing Brief, Attorney Affidavit and Excerpts of Exhibits filed on behalf of Plaintiff in opposition annexed as Exhs. "I" and "J"; *see also* Watnick's brief in reply annexed as Exh. "K".

[6] *See* Plaintiff's Brief, Affirmation and Excerpts of Exhibits annexed as Exhs. "L" and "M"; Watnick's Opposition Brief, Supporting Affirmation and Excerpts of Exhibits annexed as Exhs. "N" and "O"; Plaintiff's Reply Brief annexed as Exh. "P".

[7] The moving and reply briefs on the Spoliation Motion, and the opposition brief on the Preclusion Motion, were submitted in the name of, and signed off by, Watnick, as attorney of record. *See* Exhs. "F", "K" and "N". None of the briefs were signed by Defendant Stark, who, public records show, maintained her own law firm as opposed to being employed by, or an associate or partner of, Watnick. *See* Exh. "C". The only place Stark's name even appears in the record of the Underlying Action is in three pages at the end of the transcript of oral argument of the motions *in limine*. She spoke only relative to the Preclusion Motion. She never raised any of the purportedly deceitful statements complained about in the Complaint at that argument. *See* Exh. "G" at pp. 23, 27-30.

By order dated October 30, 2014, the Appellate Division reversed the decision granting the Spoliation Motion on the basis that Christina's objection to the adequacy of discovery was untimely, among other grounds. *See* Exh. "V". The Appellate Division did not disturb the order denying the Preclusion Motion. Thus, that order is still law of the case. After eighteen years, the Underlying Action is *finally* trial ready. *See* Exh. "B".

Collateral Litigation By Plaintiff Against Christina

In addition to the Underlying Action, in December 2010 Plaintiff instituted a separate fraudulent conveyance action against Christina, captioned *Ames Ray v. Christina Ray*, Index No. 652314/2010. Christina, then *pro se*, moved to dismiss. Judge Ramos granted her motion. *See* Order dated July 12, 2011 and transcript dated April 28, 2011 annexed collectively as Exh. "W". He stated that the action was "obviously brought in bad faith" and was "frivolous." *See id.*, p. 13. The dismissal was affirmed on appeal. *See* Order of Appellate Division dated July 9, 2013 annexed as Exh. "X".

Despite dismissal of the initial fraudulent conveyance action, undeterred, Plaintiff instituted another fraudulent conveyance action in 2014, captioned *Ames Ray v. Christina Ray and Guarnerius Management LLC*, Index No. 153945/2014. Defendant Watnick, on Christina's behalf, moved to dismiss this action and for sanctions. Judge Ramos again granted the motion to dismiss and for sanctions (he noted that bringing the same claim again reflected "bad faith"). *See* Transcript of Proceedings of November 12, 2014 and Order dated September 15, 2015 annexed collectively as Exh. "Y", p. 13. Plaintiff commenced this action thereafter. See Exh. "A".

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[8] *See* also Excerpts of Appellate Briefs for Plaintiff/Appellant and Defendant/Respondent and the Reply Brief for Plaintiff/Appellant annexed as Exhs. "S", "T", "U".

The Alleged Deceits Identified in the Complaint

In the Complaint, Plaintiff identifies eight statements which were contained in Watnick's trial court and appellate briefs on the Preclusion Motion and the Spoliation Motion and alleges that each of these statements constitutes a deceit on the Court in violation of §487. However, as set forth below, several of these statements were based on Judge Ramos' own decision and each of these statements constitutes, at most, a controverted assertion based upon a plausible interpretation of disclosed facts in the record. Such statements are nothing more than the normal work of lawyering, and are of an entirely different character than statements which are actionable under §487.

Alleged Deceit Regarding Admissions of Physical Abuse, Oppressive Circumstances and Knowledge Christina Was Fearful of Plaintiff

Plaintiff alleges that Defendants violated §487, when, in opposing the Preclusion Motion, the brief stated the following:

> "The third quarrel Dr. Kirstein has with the Report is that his review of the evidence does not reveal physical abuse.[9] Clearly, Dr. Kirstein missed Plaintiff's admission in his deposition that he physically abused Christina and that she was fearful of him."

Exh. "A", ¶22; *see also* Exh. "N", pp. 8-9.

> "[A]s this Court recognized, Plaintiff also admits the existence of oppressive circumstances and that he knew Christina feared him."

Exh. "A", ¶29; *see also* Exh. "N" at p. 12.

However, these statements were not deceitful.

Plaintiff's Preclusion Motion sought to preclude the introduction at trial of the expert report of Christina's psychiatric expert. *See* Exhs. "L" and "M". Specifically, Christina's expert, board certified psychiatrist Laurie A. Stevens, M.D., had opined that Christina had signed the documents at issue "without regard to her own interests" in the context of a "controlling and abusive" and "unbalanced" relationship with

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[9] Plaintiff conspicuously omits here the fact that Defendants' brief attributed these statements to Exh. "E" to Watnick Aff. at pp. 3 and 5, which is the Decision of Judge Ramos. Watnick's affirmation is annexed as Exh. "O" to DiGennaro Dec. and Judge Ramos' decision is annexed as Exh. "D".

Plaintiff. *See* Stevens' Report at p. 2, annexed as part of Exh. "M". The overall conclusion of her report was that Christina was in an *emotionally* abusive and completely dominated relationship in which Christina's "judgment, reason and intelligence were suspended." *Id.* p. 7; *see also* Exh. "N" at p. 7. This report did not mention physical abuse.

In support of the Preclusion Motion, Plaintiff's brief stated that Plaintiff's expert, Dr. Larry Kirstein, "correctly notes in his report" that the record relied on by Dr. Stevens does not show that Plaintiff was physically or verbally abusive. Exh. "L", p. 7. Dr. Kirstein's report attacked Dr. Stevens' report generally as junk science and asserted that his review of the evidence did not reveal that Christina was a victim of physical abuse. He stated "...[d]espite my attempts, I could find no indication of any physical abuse by AR from either his or CR's deposition testimony." *See* Kirstein Report annexed as part of Exh. "M" at p. 5 (emphasis added). Thus, it was Plaintiff's brief and Dr. Kirstein's report which raised the issue of physical abuse, not Defendants.

In Christina's brief in opposition, the statements in issue were made in direct response to Plaintiff's claim that there was no "indication" of physical abuse in the record, including in Plaintiff's deposition testimony. Significantly, the brief cited to and relied upon the 2008 decision of Judge Ramos on both parties' summary judgment motions. *See* Exh. "O", ¶9 and Exh. "D". The court stated in its 2008 decision as follows:

> Underlying these issues are Defendant's disturbing allegations of the Plaintiff's oppressive behavior, which the Defendant contends forced her to sign the documents and agreements. These allegations of oppressive circumstances are credible, given the Plaintiff's admission in his deposition that he physically abused her "maybe to alleviate some fear she had about what I might do." Ames Dep. p. 52.

Id. p. 3 (emphasis added). The statements in Christina's brief are a fair characterization of the court's decision cited above.

Notably, in reply, Plaintiff's response to these statements was relegated to an eight-line footnote, which glossed over the fact that Christina's brief, in fact, cited to the Court's own decision and the Court's "characterization" of Plaintiff's testimony as an "admission" of physical abuse. *See* Exh. "P", p. 9.

Alleged Deceit Regarding Documents Produced Preceding the
Date of the Confession of Judgment, Its Drafting, and Enforcement

Plaintiff alleges that Defendants committed a deceit when, in the brief in support of the Spoliation Motion, it was stated that:

> Ames produced only one letter that preceded the date of the Confession – the unsigned Feb. 17, 1993 letter about the Confession and that stated that it was from Christina to Alkalay. Conspicuously absent from Ames' and Alkalay's document production are any drafts of the Confession, written communications about the Confession or notes about its drafting or its enforcement.

Exh. "A", ¶36; *see also* Exh. "F" at p. 9. However, this statement is not deceitful.

Watnick filed the Spoliation Motion seeking dismissal of claims and preclusion of evidence pertaining to, *inter alia*, the Confession of Judgment. A thrust of the motion was that Plaintiff and his attorney failed to preserve crucial evidence relative to the creation, drafting or enforcement of the Confession of Judgment, thereby prejudicing Christina and her ability to present defenses. *See* Exh. "F" at p. 1. Watnick argued that Plaintiff's lawyer, Alkalay, preserved no file relative to the Confession of Judgment, despite preparing it and corresponding about it and acting as counsel to both Ames and Christina Ray in connection with it. *Id.*

In opposition to the Spoliation Motion, Plaintiff contended that Christina's "...assertion is false [as] all of the documents were either produced by Plaintiff or were in the possession of Defendant" (emphasis added). *See* Exh. "I" at p. 6. The record did not support Plaintiff's assertion. As an initial matter, telling the Court that Christina possesses documents did not address the contention that Plaintiff failed to produce documents or establish that Defendant's claims were deceitful.

Further, the documents thereafter identified in Plaintiff's counsel's brief and Affidavit to prove the supposed falsity of these assertions were not documents produced in discovery which addressed the "creation" of the Confession of Judgment which preceded its signing. *See id.* at pp. 6-7; and Exhibit "J", ¶11.[10]

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[10] Specifically, Plaintiff's opposition identified only five documents purportedly produced in discovery relevant to this issue. First, the February 17, 1993 letter which Watnick plainly acknowledged had been produced. Second, an undated Confession of Judgment calculations which were attached to the complaint and which

Finally, Plaintiff acknowledged his failure to produce documentation regarding enforcement of the confession because he claimed in his brief that "Plaintiff chose not to enforce." Exh. "I", p. 7. In sum, Watnick's statements were not deceitful, but reasonable argument from the record presented on the motion.

Alleged Deceit Regarding Documents Produced Pertaining to the Penalty Letter's Creation

Plaintiff also alleges that Defendants made a deceitful statement by setting forth, in both the moving papers on the Spoliation Motion and on appeal, that "Ames produced no documents relating to [the Penalty Letter's] creation." Exh. "A", ¶¶36, 41 (emphasis added); *see also* Exh. "F", p. 9; and Exh. "T", p. 14.

The Spoliation Motion argued that evidence should be precluded and claims dismissed pertaining to the Penalty Letter, due to the failure to preserve or produce documents pertaining to the Penalty Letter's creation. Exh. "F", pp. 1-2. Plaintiff's argument in opposition in his brief did not rebut Watnick's contention. In his opposing brief, Plaintiff simply noted that a draft of the Penalty Letter (referred to by Plaintiff as the "Financials Agreement") was produced by Christina. Exh. "I" at p. 7. The only other document referenced in his response is the same February 17, 1993 letter[11] (annexed as Exh. 3 to Alkalay Aff.; Exh. "J" to DiGennaro Dec.) that Watnick acknowledged had been produced. *See* Exh. "I" at p. 7. While Judge Ramos acknowledged that while both the Penalty Letter and Confession of Judgment were in the record, he also held that drafts of these documents or documents about their creation were not produced, contrary to the claims in this action. *See* Exh. "Q", p. 2.

Alleged Deceit Pertaining to Prejudice Caused By the Spoliation of the Salomon Litigation File

Plaintiff further alleges that Defendants committed a deceit when, in the brief in support of the Spoliation Motion, it was stated:

Plaintiff's counsel did not claim was produced in discovery. *See* Exh. "J", ¶ 11(c) fn. 1. Third, communication between Christina and Ames postdating the creation of the Confession of Judgment dated August 10, 1994 and another undated document (which Plaintiffs acknowledges was post execution of the confession). *See* Exh. "I" at pp. 6-7. Finally, Plaintiff's opposition identified an October 2, 1992 letter which pre-dated the Confession of Judgment by six months referred to a different sum due and did not appear to be a draft of the April 1, 1993 confession. *Id.*

[11] Further, that letter had no apparent connection to the "creation" of the Penalty Letter by its terms. *See id.*

> "[W]ithout the [Salomon Litigation] files, Christina is unfairly denied evidence . . . The prejudice here is especially severe because there are no documents that address these issues and Plaintiff's attorney had access to the Salomon Action file . . ."

Exh. "A", ¶38;[12] *see also* Exh. "F" at p. 23.

An issue raised in the Spoliation Motion was that Plaintiff's evidence regarding the supposed sale of Plaintiff's interest in the Sagaponack Property should be precluded because Plaintiff and/or his counsel had failed to preserve and produce a file pertaining to the Salomon Litigation in which Alkalay had represented both Rays. *See* Exh. "F" at pp. 1, 6-7. Plaintiff had alleged that in 1984 Christina bought out Plaintiff's interest in the house and that she owed him $350,000 as a result. She denied such a phantom sale, and claimed that spoliation of the Salomon Litigation file denied her evidence of Plaintiff's continued ownership of the house after the sham "sale," as litigation was brought in both of their names. Exh. "F", p. 23.

While Plaintiff claims in opposition that Christina was speculating that the files concerning the Salomon Litigation existed (see Exh. "I" at pp. 10, 12), this assertion was inconsistent with Alkalay's testimony where he admitted that the files existed and were not preserved (*see* Exh. "G", pp. 7-8, 9, 10, 15; *see also* Exh. "J", ¶32), which the court recognized during oral argument. *See* Exh. "G" at 10-15. Plaintiff's lawyers explained that Plaintiff and Alkalay produced documents relative to the Salomon Action secured from "publicly available court records," as well as "correspondence between the parties..." but failed to produce the litigation file. *See* Exh. "G" at pp. 10, 12. It was clear in any event that no "litigation hold" was placed on Alkalay's litigation file. *Id.* at p. 10.

Oral argument was held and the court granted the Spoliation Motion with regard to Salomon Litigation files on the record. Exh. "G" at p. 15. Judge Ramos stated "This is a serious problem . . . This is litigation that you commenced and you didn't put a litigation hold on, the motion is granted." *Id.* at p. 15; *see also* Exh. "Q". Under these circumstances, the Plaintiff's claim of deceit is nothing more than Plaintiff's dissatisfaction with that ruling.

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[12] This statement in the Complaint also omits important text from the middle and end of the sentence that puts the Defendants' argument in meaningful context. *See* Exh. "F" p. 23.

Alleged Deceit Regarding Documentary Substantiation of Payment of Christina's Credit Card Bills

Plaintiff alleges that Defendants made deceitful statements with regard to the existence of documents substantiating Plaintiff's payment of Christina's Credit Card debts. One such statement was contained in opposition to the Preclusion Motion, wherein it was stated:

> "[A]lthough Plaintiff seeks to recover monies he paid towards Christina's credit card debts, he failed to produce a shred of documentary evidence that he ever made such payments."

Exh. "A", ¶46; *see also* Exh. "N" at p. 5.

In addition, Watnick made a statement in the Spoliation Brief that:

> "no such files have been produced and Plaintiff's failure to preserve them [the files] denies Christina evidence that would[13] directly bear upon whether Ames paid this credit card debt."

Exh. "A", ¶46;[14] see *also* Exh. "F", p. 23.

Contrary to Plaintiff's assertion, such statements do not constitute deceit. Watnick's statement in the Preclusion Motion brief cited to Exhibit "J" to the accompanying Watnick Affirmation (omitted above), which was the transcript of proceedings of oral argument of the summary judgment motions before Judge Ramos. At oral argument, Judge Ramos asked Plaintiff's counsel, Mr. Alkalay, directly: "Is there any substantiation that your client paid a credit card bill on the account of Christina Ray?" Mr. Alkalay's response was "There is testimony to that effect your Honor." *See* Transcript annexed as part of Exh. "O", p. 37. In response to a further colloquy on this issue with Judge Ramos, counsel for Plaintiff never identified documentary substantiation of Plaintiff's payment of this debt. Moreover, predecessor counsel for Christina reiterated numerous times on the record that no receipts or other documentary substantiation had been produced. *See id.* at pp. 34, 44, 45, 47, 48, 49.

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[13] Plaintiff's Complaint misquotes this phrase as it actually reads "could directly bear . . ." Exh. "A", ¶46 (emphasis added).

[14] Plaintiff conspicuously omitted the end of that sentence which reads "(which, as noted, the IRS said there was no substantiation for). (Id.)" Exh. "F", p. 23.

The absence of documentary substantiation of the claim that Plaintiff paid Christina's credit card debt was also raised in the Spoliation Motion. Therein, it was disclosed that Plaintiff's attempt to take his alleged payment of Christina's credit card debt as a business expense bad debt had been disallowed by the IRS because it had not been substantiated that the amount was paid. *See* Exh. "H", ¶15 and exhibits referenced therein. In short, the record evidence certainly supported the good faith argument that no documentary substantiation was produced showing that the credit card bills were, in fact, paid. As set forth in the argument below, each of the statements identified are not actionable deceit under §487 as a matter of law.

ARGUMENT

POINT I
STANDARD OF REVIEW

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff must "plead enough facts to state a claim for relief that is plausible on its face." *Lichtenstein v. Reassure Am. Life Ins. Co.*, 2009 U.S. Dist. LEXIS 23656, *17 (E.D.N.Y. Mar. 23, 2009). "A claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the Defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, "the tenet that a court must accept as true all of the allegations contained in a Complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice . . . only a Complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 678-79.

Furthermore, the pleadings, orders, briefs and other papers filed in the Underlying Action are properly considered on this motion. *See Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000)(holding statements or documents incorporated by reference, possessed, known or relied upon properly considered on motion to dismiss); *Scott v. Capital One*, 2013 U.S. Dist. LEXIS 55731, *3-4 fn 2 (S.D.N.Y. Apr. 16, 2013)(holding "matters of public record," including decisions and orders in state court proceedings properly considered); *Sabatini Frozen Foods, LLC v. Weinberg Gross & Pergament LLP*, 2015 U.S. Dist. LEXIS 128220 (E.D.N.Y.

Sept. 23, 2015)(noting in §487 case that records and filings from the bankruptcy court were properly considered on motion to dismiss).

POINT II
THE COMPLAINT FAILS TO STATE A CLAIM UNDER JUDICIARY LAW §487

Section 487 provides, in relevant part, that an attorney who "is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action." Since §487 inflicts a penalty for its violation, it is considered a penal statute and therefore, is strictly construed. *Kaye Scholer LLP v. CNA Holdings, Inc.*, 2010 U.S. Dist. LEXIS 43194, *8 (S.D.N.Y. Apr. 28, 2010). *See also King v. Fox*, 2004 U.S. Dist. LEXIS 462, *20 (S.D.N.Y. Jan. 16, 2004)(noting that there is a "high burden of proof" to establish liability under §487). Relief under this statute "must be carefully reserved for the extreme pattern of legal delinquency, or for misconduct that is chronic." *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376, 408 (S.D.N.Y. 2000)(internal citations and quotations omitted), *aff'd*, 2002 U.S. App. LEXIS 13329 (2d Cir. May 30, 2002).

The Complaint fails to state a claim under §487 with respect to any of the eight alleged deceits by Defendants. Indeed, not only is the Complaint fatally defective, but it is a perversion of the statute upon which it relies. Section 487 was not intended to provide a cause of action to any party who disagrees with any assertion made by opposing counsel, and should not be the vehicle for chilling an opponent's advocacy. If this claim is permitted to proceed, nothing would prohibit any litigant who disagrees with any statement by opposing counsel from filing a separate, collateral §487 action for the purpose of discouraging effective representation by the other side. The Court should refuse to permit such gamesmanship.

In order to state a *prima facie* claim for a violation of §487, Plaintiff has to demonstrate that (1) the Defendants are guilty of deceit or collusion, or consented to any deceit or collusion; (2) the Defendants had an intent to deceive the court or any party; and (3) that damages were caused by the deceit. *Iannazzo v. Day*

Pitney LLP, 2007 U.S. Dist. LEXIS 50649, at *31 (S.D.N.Y. July 10, 2007). Here, Plaintiff has not set forth facts plausibly supporting any of the necessary elements of the claim.

A. Defendants' Advocacy Is Not Actionable 'Deceit' Under §487

Deceit under §487 is defined as "intentionally giving a false impression" or "a false statement of fact made knowingly or recklessly with the intent that someone else will act upon it." *Bobker v. Herrick Feinstein LLP*, 41 Misc. 3d 1233(A), 983 N.Y.S.2d 201, 2013 N.Y. Misc. LEXIS 5435, *13 (Sup. Ct. New York County 2013)(internal quotations omitted). *See also Amalfitano v. Rosenberg*, 428 F. Supp. 2d 196, 211 (S.D.N.Y. 2006), *aff'd*, 572 F.3d 91 (2d Cir. 2009). Here, the statements at issue do not constitute deceit, but rather were expressions of vigorous advocacy made by attorneys on behalf of their client. This is demonstrated by the fact that *each* of the allegedly deceitful statements constitutes, at the very least, a reasonable interpretation of the facts and evidentiary record which were properly before the Court and well within the bounds of appropriate advocacy.

The allegedly deceitful statements concerning Plaintiff's admission of physical abuse and that Christina was fearful of him (Exh. "A" ¶¶ 22, 29) were made in explicit reliance on Judge Ramos' own prior decision issued in 2008. *See* Exh. "D" at p. 3. Judge Ramos in turn relied on his reading of Plaintiff's own deposition testimony. *See id.* It can hardly be alleged to be knowing deceit to cite a court's decision back to it. *See Kashelkar v. Bluestone*, 2007 U.S. Dist. LEXIS 7584, 28 (S.D.N.Y. July 25, 2007), *report and recommendation adopted in part*, 2007 U.S. Dist. LEXIS 71313 (S.D.N.Y. Sept. 26, 2007), *aff'd*, 306 Fed. Appx. 690 (2d Cir. 2009)(holding that no §487 claim was made by Defendant's reference to decisions of the federal court in a motion in state court).

With regard to the claim that Defendants made a deceitful statement to the court by arguing that Plaintiff failed "to produce a shred of documentary evidence that he ever made such [credit card] payments" (Exh. "A" ¶46), and the related claim that Plaintiff failed to preserve files relating to the Confession of Judgment "could directly bear upon whether Ames paid this credit card debt" (*see* Exh. "F", p. 23), these too were supported by record evidence. Specifically at oral argument on the summary judgment motions, Plaintiff's counsel was unable to identify any documentary substantiation of Plaintiff's payment of the credit card bills, and could refer the Court only to Plaintiff's testimony. Additionally, Plaintiff's tax records revealed that the IRS rejected a bad debt deduction for such payment because there was no substantiation it had been paid. Exh. "H", ¶15 and exhibits referenced therein. These statements are not knowingly false when Defendants relied upon the record evidence to support them.

Plaintiff claims that Defendants committed an act of deceit by arguing that Christina was prejudiced and "unfairly denied evidence" by failure to produce the Salomon Litigation file. Exh. "A", ¶38. As set forth, previously there was evidence that Plaintiff's counsel, Alkalay, who represented Christina in the Salomon Litigation, had a file and did not issue a litigation hold on that file. *See* Exh. "G" and p. 15. Whether the loss of such evidence was prejudicial to Christina is the type of legal argument that can never be the subject of a claim of deceit. It is pure advocacy as explained more fully below.

Plaintiff also claims Defendants deceived the court by stating that "Ames produced only one letter that preceded the date of the Confession" and that "conspicuously absent" from the production were "any drafts of the confession, written communications about its drafting or enforcement." However, those statements were based upon Defendants' review of the discovery of a fourteen year old litigation and supported by record evidence. In fact, Judge Ramos weighed the evidence presented by both sides and agreed that while the Confession of Judgment was produced, drafts or documents preceding its entry were not produced. *See* Exh. "Q" at p.2.

Finally, Plaintiff alleges that Defendants deceived the court by asserting (in both the trial and appellate briefs) that "Ames produced no documents relating to [the Penalty Letter's] creation." Exh. "A", ¶¶36, 41 (emphasis added). Here again, Judge Ramos held, after review of all the evidence that documents pertaining to the creation of the Penalty Letter were not produced. *See* Exh. "Q", p. 2. Plaintiff's dissatisfaction with this decision or disagreement about the adequacy and extent of discovery is not deceit, it is litigation.[15]

In fact, in the final analysis, even if, assuming *arguendo*, any of Defendants' statements were found to be unpersuasive or unfounded, that would not establish that any deceit was perpetrated on the court. Rather, the statements at issue, which reflect "positions concerning contested issues . . . or unsettled matters . . . between the parties . . . are distinguishable from those that other courts have found to be actionable under §487." *Sabatini Frozen Foods, LLC v. Weinberg, Gross & Permagent, LLP*, 2015 U.S. Dist. LEXIS 128220, *13-14 (E.D.N.Y. Sept. 23, 2015). *See also Curry v. Dollard*, 52 A.D.3d 642, 644, 862 N.Y.S.2d 54, 56 (2d Dep't 2008)(holding Defendant attorneys' advocacy of "a reasonable interpretation of the QDRO most favorable to their clients . . . cannot fairly be considered deceitful or fraudulent"); *Alliance Network, LLC v. Sidley Austin, LLP*, 43 Misc. 3d 848, 860, 987 N.Y.S.2d 794, 804 (2014)(where Plaintiffs' Complaint merely "highlight[ed] the Attorney Defendants' positions on contested issues in the underlying litigations and cast those positions as deceits" the allegations were of an "entirely different nature" and "far afield" from conduct found deceitful under §487); *Matter of Seaman*, 2010 N.Y. Misc. LEXIS 3078, *8, 2010 NY Slip Op 31749(U), *5 (Sur. Ct. Nassau County June 30, 2010)(statements that lawyer deceitfully failed to state adverse parties' compliance with discovery, even if true, do not state a cause of action under §487); *Kuruwa v. 130 E. 18 Owners Corp.*, 121 A.D.3d 472, 472-73, 994 N.Y.S.2d 578, 579 (1st Dep't 2014)(holding legal arguments made by counsel do not give rise to a claim under §487).

The case *O'Callaghan v. Sifre*, 537 F. Supp. 2d 594 (S.D.N.Y. 2008) is instructive as the Court noted:

> By confining the reach of [§487] to intentional egregious misconduct, this rigorous standard affords attorneys wide latitude in the course of litigation to engage in written and oral expression consistent with responsible, vigorous advocacy, thus excluding from liability statements to a court that fall 'well within the bounds of the adversarial proceeding.' Under

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[15] It is ironic, given the §487 claims pled, that the Complaint misrepresents the Defendants' actual statements in the briefs. For example, contrary to Plaintiff's assertions in ¶54 of the Complaint, Defendants never represented to the Court that "Plaintiff did not submit any documents concerning Christina Ray's financials letter, the Salomon Litigation and Confession of Judgment." Rather, the brief addressed the failure to produce the Salomon Litigation file and documents which preceded the creation of the Penalty Letter and documents pertaining to drafting of the Confession of Judgement and its enforcement.

> this threshold, an action grounded essentially on claims that an attorney made meritless or unfounded allegations in state court proceedings would not be sufficient to make out a violation of §487.

Id. at 596 (internal citations omitted). *See also O'Brien v. Alexander*, 898 F. Supp. 162, 169-70 (S.D.N.Y. 1995), *aff'd in part, rev'd in part on other grounds*, 101 F.3d 1479 (2d Cir. 1996)(holding that allegation that Defendant's claims against Plaintiff were unfounded, insufficient basis to assert §487 claim); *Lazich v. Vittoria & Parker*, 189 A.D.2d 753, 754, 592 N.Y.S.2d 418 (2d Dep't 1993)(dismissing §487 claim where "all the statements and conduct complained of were well within the bounds of the adversarial proceeding"). *See also Burton v. Krohn (In re Swift)*, 2016 Bankr. LEXIS 262, *15 (Bankr. E.D.N.Y. Jan. 27, 2016)(holding that the mere assertion of unfounded allegations, even if made for "improper purposes," is insufficient to "provide a basis for liability" under §487); *Ticketmaster Corp. v. Lidsky*, 245 A.D.2d 142, 143, 665 N.Y.S.2d 666, 667 (1st Dep't 1997); *Thomas v. Chamberlain, D'Amanda, Oppenheimer & Greenfield*, 115 A.D.2d 999, 999-1000, 497 N.Y.S.2d 561, 562 (4th Dep't 1985). Thus, even assuming *arguendo* for purposes of this motion that Defendants' statements at issue were unfounded (which is disputed), Plaintiff has failed to set forth that such statements rise to the level of actionable deceit.

Plaintiff's failure to set forth facts supporting a plausible inference that Defendants' statements at issue were deceitful warrants dismissal of this action. *Hansen v. Werther*, 2 A.D.3d 923, 924, 767 N.Y.S.2d 702, 703 (3d Dep't 2003)(rejecting §487 claim on motion to dismiss where record contained "no evidence to support Plaintiff's claims of false representations and misconduct by defendants").

The alleged misconduct here is nothing like the type of extreme egregious misconduct courts recognize as actionable under §487. *See e.g.*, *Amaltifano v. Rosenberg*, 12 N.Y.3d 8, 903 N.E.2d 265, 874 N.Y.S.2d 868 (2009)(sustaining §487 claim where lawyer submitted falsified documents to the court and made knowingly false misrepresentations about his own client to concoct standing to sue); *Papa v. 24 Caryl Avenue Realty Co.*, 23 A.D.3d 361, 361-62, 804 N.Y.S.2d 112, 113 (2d Dep't 2005)(deeming attorney's commencement of foreclosure on mortgage actionable under §487 where attorney knew about judicial determinations holding that the mortgage was satisfied); *Cooke-Zwieback v. Oziel*, 33 Misc.3d 1232 [A], 943 N.Y.S.2d 791, 2011 N.Y. Misc., LEXIS 5774, *21-22 (Sup. Ct. New York County 2011)(deeming §487 claim viable where attorney falsely stated to the court that he represented a party to the action).

As to Stark, the claim of knowing deceit is equally, if not even more specious, as she was not an attorney of record and her name does not appear on a single brief which contained the allegedly offending statements. The Complaint contains no facts as to her role in the Underlying Action and the record on this motion shows she attended the argument of the motions *in limine* with Watnick and argued only in opposition to the Plaintiff's Preclusion Motion. *See* Exh. "G", p. 23. In the three pages in which she spoke, she neither uttered nor referred to any statement Plaintiff has identified as deceitful. *See* Exh. "G" at pp. 27-30. Nevertheless, her name is lumped together with Watnick's throughout the Complaint. This is insufficient under Rule 8 and is alone reason to dismiss. *See Ochre LLC v. Rockwell Architecture Planning & Design*, 2012 U.S. Dist. LEXIS 172208, *16 (S.D.N.Y. Nov. 28, 2012), *aff'd*, 530 Fed. Appx. 19 (2d Cir. 2013)(holding under Rule 8 "where a complaint names multiple defendants, that complaint must provide a plausible factual basis to distinguish the conduct of each of the defendants" and the "failure to isolate key allegations against each defendant supports dismissal under the standards set forth in *Twombly* and *Iqbal*").

Further there are no facts alleged reflecting that she either knew of any alleged deceit in the papers submitted or "consented" to them. Treble damage provisions are to be given the same strict scrutiny as punitive damage awards. *See Lyke v. Anderson*, 147 A.D.2d 18, 541 N.Y.S.2d 817 (2d Dep't 1989). More than her presence in court or association with Watnick is required. Her participation in, or ratification of, the wrongful acts is required. *Id.* No such allegations of fact have been pled.

B. Plaintiff Has Failed To Set Forth A Plausible Allegation That Defendants Intended To Deceive The Court

The Complaint should be dismissed for the additional reason that it fails to set forth any plausible claim that the Defendants acted with *intent* to deceive the Court. *See, e.g. Haggerty v. Ciarelli & Dempsey*, 374 Fed. Appx. 92, 93-94 (2d Cir. 2010)(affirming the dismissal of a §487 claim where the Complaint failed to plausibly allege an intent to deceive the court and that courts do not readily assume intent to deceive "from conduct falling 'well within the bounds of an adversarial proceeding); *see also Nimkoff Rosenfeld & Schecter, LLP v. RKO Properties, Ltd.*, 2011 U.S. Dist. LEXIS 22895, *9 (S.D.N.Y. March 4, 2011). Here, the making or opposing of motions *in limine* and making arguments in reliance upon the trial court's prior decision or cited and submitted evidence is clearly within the bounds of the adversarial process. In fact, it is absurd to suggest that Defendants intended to deceive the trial court by citing its own decision back to it. *See* Exh. "A", ¶¶31-32.

While the Complaint contains wholly conclusory allegations that Defendants made the statements knowing that they were untrue and with intent to deceive the court (*see e.g.* Exh. "A" at ¶¶27, 28, 32, 33, 34, 44), as set forth above, each and every statement at issue had evidentiary support and fell well within the bounds of appropriate advocacy. Where, as here, the statements at issue consist of nothing more than "simple advocacy," those statements do not give rise to any inference that the Defendants acted with intent to deceive. *See Seldon v. Lewis Brisbois Bisgaard & Smith LLP*, 116 A.D.3d 490, 491, 984 N.Y.S.2d 23, 24 (1st Dep't 2014).'"

Further, given the age of the case and extent of discovery which had been conducted before Watnick had been retained, even assuming *arguendo*, an isolated document produced in discovery was mischaracterized or simply missed in connection with the Spoliation Motion that would still not support an inference of intent to deceive actionable under the statute. As this Court has held, "negligence is not sufficient to state a claim for a violation of §487." *Samms v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP*, 2015 U.S. Dist. LEXIS 87582, *15 (S.D.N.Y. July 6, 2015). Facts plausibly supporting an inference of intent to deceive are required.

None of the statements in issue "evince any intentional deceit with respect to an undisputed fact within Defendants' personal knowledge. Instead, they reflect Defendants' positions concerning contested issues...on unsettled matters...between the parties to that proceeding." *See Sabatini Frozen Foods, LLC,* 2015 U.S. Dist. LEXIS 128220 at *13. They simply do not create any inference of intent to deceive, the absence of which is fatal to the claim alleged. *Id.*[16]

The Complaint's failure to allege facts plausibly supporting an inference of intent to deceive as to Watnick certainly compels such a conclusion as to Stark given her much more limited role in the matter and the absence of any facts supporting her intent.

C. Plaintiff Has Not Alleged Facts Supporting A Plausible Inference That Defendants Proximately Caused Him To Incur Any Recoverable Damages

Finally, in order to state a §487 claim, Plaintiff must plead damages proximately caused by the Attorney Defendants' alleged deceit. *See Creswell v. Sullivan & Cromwell*, 771 F. Supp. 580, 587 (S.D.N.Y. 1991), *aff'd*, 962 F.2d 2 (2d Cir. 1992); *Strumwasser v. Zeiderman*, 102 A.D.3d 630, 958 N.Y.S.2d 395 (1st Dep't 2013). Plaintiff has failed to do so here. Plaintiff seeks two categories of damages: attorney's fees in defending the alleged deceit and damages to his reputation. These damages were not proximately caused by Defendants' acts or legally recoverable. Exh. "A", ¶57.

While Plaintiff alleges that he has incurred attorneys' fees in defending himself from the statements at issue, Plaintiff cannot show that any of those legal expenses were proximately caused by Defendants' statements. In *Amaltifano,* 12 N.Y.3d 8, the New York Court of Appeals set forth that legal fees can constitute recoverable damages under §487 where a party commences an action grounded in a material misrepresentation of fact. "Because, in such a case, the lawsuit could not have gone forward in the absence of the material misrepresentation, that party's legal expenses in defending the lawsuit may be treated as the proximate result of the misrepresentation." *Id.* at 15. Such circumstances are not present here. The Plaintiff in this action is also the Plaintiff in the Underlying Action, and he was not forced to defend any *lawsuit* as the

[16] Nor should Plaintiff be permitted to conduct a discovery fishing expedition based on pure speculation that discovery will reveal evidence of Defendants' intent to deceive. *Sabatini Frozen Foods, LLC,* 2015 U.S. Dist. LEXIS 128220, at *10; *see also O'Callaghan*, 537 F. Supp. 2d at 597 (noting that "[g]iven the strict test New York law imposes to satisfy §487, the Court is not persuaded that further proceedings in this case would be productive in moving [Plaintiff's] claims 'across the line from conceivable to plausible.'")

result of Defendants' alleged deceits.

In fact, Plaintiff does not plead, and cannot claim that any motion which was litigated in the Underlying Action, causing Plaintiff to incur legal fees, was litigated as a proximate result of Defendants' allegedly deceitful statements. For example, with respect to the Preclusion Motion, Plaintiff was the movant so the legal fees he incurred in making such a motion cannot be attributed to the allegedly deceitful statements set forth in opposition. Moreover, given that the entirety of Plaintiff's response to the allegedly deceitful statements in the Preclusion Motion in reply was an eight-line footnote, any legal fees 'traceable' to the statements at issue would be at most *de minimus. See* Exh. "P" at p. 9, fn. 8.

Similarly, even though Defendant was the proponent of the Spoliation Motion, the gravamen of that motion arose from the failures of Alkalay to place a litigation hold on, or preserve and produce his files pertaining to, the Salomon Litigation, Confession of Judgment or Penalty Letter. The allegedly deceitful statements did not cause the legal fees which were incurred in defending a much broader motion. Finally, Plaintiff was the appellant in connection with the appeal in which the single allegedly deceitful sentence in Watnick's 61 page appellate brief appeared regarding failure to produce documents related to the Penalty Letter's creation (see Exh. "T") and Plaintiff's reply brief failed to even address this statement. *See* Exh. "U". Thus, none of the appellate legal fees were proximately caused by Defendants' statements.[17]

Under such circumstances, no cause of action under §487 may stand. *See, e.g. Mizuno v. Nunberg*, 122 A.D.3d 594, 996 N.Y.S.2d 301 (2d Dep't 2014), *lv. to appeal denied*, 24 N.Y.3d 914, 25 N.E.3d 987, 2 N.Y.S.3d 72 (2015)(affirming dismissal of §487 claim where litigation costs could not reasonably be attributed to the allegedly false testimony offered or, by extension, by the Defendants' conduct as counsel to the Plaintiffs' adversaries); *see also Werner v. Katal Country Club*, 234 A.D.2d 659, 650 N.Y.S.2d 866 (3d Dep't 1996)(dismissing §487 claim because Plaintiff failed to allege facts establishing a causal nexus between

[17] Even assuming *arguendo* any legal fees could be attributed to Plaintiff's having to respond to Defendants' statements, such legal fees would surely fall below this Court's monetary jurisdictional threshold needed to support diversity jurisdiction. 28 U.S.C. §1332(b).

alleged deceit and legal fees incurred, finding it wholly speculative to claim they would not have been incurred but for the statements at issue); *O'Connor v. Dime Savings Bank F.S.B.*, 265 A.D.2d 313, 696 N.Y.S.2d 477 (2d Dep't 1999).

Plaintiff's assertion that he incurred reputational damages (*see* Exh. "A", ¶57) as a result of Defendants' allegedly deceitful conduct is simply not recoverable under §487. Rather, claims for injury to reputation sound in defamation. *See Lesesne v. Brimecome*, 918 F. Supp. 2d 221, 224 (S.D.N.Y. 2013)("Defamation is injury to a person's reputation, either by written expression (libel) or oral expression (slander)"). Where, as here, any defamation claim arising out of the statements at issue is time-barred, Plaintiff cannot "circumvent the one-year statute of limitations [for defamation] with creative labeling." *Conte v. County of Nassau*, 596 Fed. Appx. 1, 4 (2d Cir. 2014).[18] *See also Torres v. CBS News*, 879 F. Supp. 309, 316 (S.D.N.Y. 1994)(noting that "New York courts have been alert to attempts to circumvent the one-year period for defamation actions by characterizing the claim or injury as something else").[19]

In any event, Plaintiff could not assert a viable claim for defamation arising out of the allegedly deceitful statements, as it is well-established that "absolute immunity from liability for defamation exists for oral or written statements made by attorneys in connection with a proceeding before a court 'when such words and writings are material and pertinent to the questions involved.'" *Front, Inc. v. Khalil*, 24 N.Y.3d 713, 718, 4 N.Y.S.3d 581, 584, *reargument denied*, 25 N.Y.3d 1036, 32 N.E.3d 956, 10 N.Y.S.3d 519 (2015), *quoting Youmans v. Smith*, 153 N.Y. 214, 219 (1897).

Moreover, Plaintiff's assertion that he is entitled to injunctive relief is similarly unwarranted. *See* Exh. "A", p. 11. § 487 does not authorize injunctive relief, and the undersigned could not identify any case where an attorney was enjoined from committing violations of §487. *See also Schertenleib v. Traum*, 589 F.2d 1156, 1166 (2d Cir. 1978)(noting that §487 is "intended to regulate, *through criminal and civil sanctions*, the conduct of litigation before the New York courts.")(emphasis added). Given the imminence of the trial in the Underlying Action, seeking such an "injunction" is patently designed to impact Watnick's zealous advocacy on Christina's behalf and is palpably improper.

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[18] The statements at issue were made on December 5, 2012, January 25, 2013, and August 22, 2014. Exh. "A",¶¶21, 35, 41. Thus, when the present action was commenced, in December 2015, a defamation claim was untimely.

[19] Further, to the extent that Plaintiff incurred any injury to his reputation arising out of the allegation that he admitted physically abused Christina, such injury occurred in 2008 at the time that Judge Ramos issued his public decision stating that Plaintiff had admitted physically abusing Christina, long before Watnick's retention.

POINT III
THE COMMENCEMENT OF THIS ACTION IS AN IMPROPER
COLLATERAL ATTACK ON THE PENDING STATE COURT ACTION

§ 487 does not permit a dissatisfied party in litigation to collaterally attack the proceedings in a pending action on the eve of trial. Yet that is precisely what Plaintiff is attempting to do by commencing the present lawsuit. The Underlying Action has been pending for approximately *18 years*. Judge Ramos has been a presiding judge for all or most of that time. As set forth above, the statements which Plaintiff alleges were deceitful were made in briefs filed between 2012 and 2014. *See* footnote 19, *supra*. Plaintiff was aware of the statements at the time that they were made, and had the opportunity to dispute their veracity and attempted to do so. That this action was brought now, when this highly acrimonious litigation is finally trial-ready, and after Judge Ramos' decision to award sanctions to Christina, should be viewed with appropriate suspicion.

It has been held that "[i]f an allegedly injured party is aware that a lawyer is violating §487 at the time the violation occurs, the victim's exclusive remedy is to bring an action in the course of that same proceeding." *Seldon v. Bernstein*, 2010 U.S. Dist. LEXIS 96989, *4 (S.D.N.Y. Sept. 16, 2010), *aff'd*, 503 Fed. Appx. 32 (2d Cir. 2012). *See also Burton v. Krohn (In re Swift)*, 2016 Bankr. LEXIS 262, *16 (Bankr. E.D.N.Y. Jan. 27, 2016)(holding that Plaintiff should have brought §487 claim in Underlying Action where allegedly deceitful statements were made, rather than in a separate proceeding); *see also Hansen v. Werther*, 2 A.D.3d 923, 923, 767 N.Y.S.2d 702, 703 (3d Dep't 2003).[20]

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[20] *cf Melcher v. Greenberg Traurig LLP*, 2016 N.Y. App. Div. LEXIS 275, *14-15, 2016 NY Slip Op 274, *4 (1st Dep't 2016)(holding that Judiciary Law §487 claim should be brought exclusively in the underlying lawsuit only

This bar on collateral attacks has been applied even in the absence of a judgment in the Underlying Action, particularly where, as here, the action is still pending. *See Sanchez v. Abderrahman*, 2012 U.S. Dist. LEXIS 45661 (E.D.N.Y. 2012)(dismissing §487 cause of action where Plaintiffs were aware of the alleged violations at the time they occurred and where the Underlying Action was still pending); *Mizrahi v. Borstein*, 2014 N.Y. Misc. LEXIS 2568, 2014 NY Slip Op 31485(U)(Sup. Ct. New York County June 5, 2014)(holding that judge before whom contempt proceeding was still pending was in a better position to resolve §487 claims regarding allegedly false and deceitful representations than judge in newly commenced action); *Little Rest Twelve Inc. v. Zajic*, 2014 N.Y. Misc. LEXIS 5404, 2014 NY Slip Op 33222(U)(Sup. Ct. New York County Dec. 8, 2014)(dismissing §487 claim noting it should be raised if at all in the pending underlying action in which misconduct allegedly occurred). Accordingly, as Plaintiff's proper remedy for the allegedly deceitful statements was to raise them before the Court where the statements were made, the present action should be dismissed.

CONCLUSION

For the reasons set forth herein and in the accompanying Declaration of Janice J. DiGennaro, Esq., it is respectfully requested that the instant motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) be granted with prejudice, together with such other and further relief as to this Honorable Court seems just and proper.

Dated: Uniondale, New York
February 25, 2016

Respectfully submitted,
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where the §487 claim "collaterally attacks any prior adverse judgment or order on the ground it was procured by fraud").